WILLIAM CUSHING[1]

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Chief Justice of the Supreme Judicial Court of Massachusetts

The biographical details of one whose life is chiefly spent in judicial service present little of general interest. No startling events challenge the attention. There is no spectacle of an instant leap from obscurity to fame. Such a life is of necessity one of slow and steady growth, like that of the oak, ring on ring. Thus alone the confidence of the people is won, and trust comes to rest secure upon his tried honesty, his solid learning, his experienced wisdom, his sound judgment, and his accurate sense of justice.

William Cushing was born in the town of Scituate, Massachusetts, on the first of March, 1732, eight days later than Washington, with whom he was later so closely associated in the establishment of our nation. He came of distinguished lineage, both his father and grandfather having been justices of the highest court of the Province of Massachusetts Bay, of which court he became also a member. One can hardly help wondering whether John Adams may have thought of this succession in judicial office from sire to son through three generations as he penned the words of the sixth article of the Declaration of Rights of the Massachusetts constitution to the effect that "the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural." But no question rightly could be made that these judicial positions came to the Cushings for causes arising wholly "from the consideration of services rendered to the public," as Adams wrote earlier in the same article. William Cushing graduated from Harvard College in 1751, taught school a short time, studied law, and was admitted to practice his profession. He began in Scituate. Soon after, he removed to Pownalborough, now Dresden, in that part of Massachusetts which subsequently became Maine. The precise date of taking up his residence there is uncertain, being given as 1755 by Washburn, and as 1760 by Willis. The reason for his settlement on the banks of the Kennebec is not clear. One would suppose that life in or near the capital of the province would have been more attractive to one of his social position. Pownalborough at that time was the frontier. He was then and for several years the only lawyer in the territory now comprised in Maine. His brother Charles preceded him there, and was sheriff of the county, and it is said that his father owned land in the vicinity. The population is described as

[1] Read before the Scituate Historical Society August 30, 1919.

"a collection of protestants from Great Britain, Ireland, France, and Germany. The greater part of them were extremely poor and very ignorant, without the means of either religious or secular education. Among such a people there was doubtless a great deal of obscure contention."

In any event, this course must have been dictated by a spirit of adventure. Life in such a community must have brought first hand experience with the rough trials of the frontiersman. The bare elements of human nature were disclosed without disguise or convention. Sophistries of reasoning could not stand under these elemental necessities of right against wrong. Directness and plainness of speech must have been essential in the conduct of affairs. The relations between men must have nourished a generous and humane character.

The probate court of Lincoln county was constituted in 1760 by the appointment of William Cushing as its first judge. He was then twenty-eight years of age. From this time until his death, a period of fifty years, he continuously occupied judicial position, a length of service not often exceeded in our history. There is in the Lincoln County Probate Records this memorandum concerning him:

"William Cushing, the first judge of the court, was of a distinguished Massachusetts family residing at Scituate where he was born on the first day of March, 1732, third son of Hon. John Cushing. He graduated from Harvard College in 1751, and after studying law for a time with Jeremiah Gridley, he established himself in the practice of the law. Upon receiving his appointment as judge of Probate he removed to Pownalborough, where until the arrival of Timothy Langdon in 1769 he was the only educated lawyer and as such he appeared as counsel in the most important cases brought before the common law courts of the county."

His first judicial act was the granting of letters of administration on November 14, 1760, upon the estate of Humphrey Purrington.

The distinction between attorneys, counsellors, and barristers existed at that time in Massachusetts, and Cushing was called to be a barrister at Boston in 1762. Only five others from what is now Maine ever have been admitted to that order. He continued to reside in Pownalborough until 1772, when he was appointed an associate justice of the Superior Court of Judicature, in succession to his father, who had resigned.

The period elapsing before the adoption of the Declaration of Independence was one of political excitement and turmoil. The most important matter which arose for decision by the judges was the practical one, whether they should be paid by the crown or by the province. This question was presented to the judges for decision, because the ministry determined that they should be paid by the crown, while the assembly were very jealous of their rights and insisted upon making

appropriation for the salaries. Cushing with most of the others decided to receive his compensation from the appropriation of the assembly. His action in this particular is described by Mrs. Warren in these words:

"A third was William Cushing, Esq., a gentleman rendered respectable in the eyes of all parties by his professional abilities and general integrity. He was a sensible, modest man, well acquainted with the law, but remarkable for the secrecy of his opinions; this kept up his reputation through all the ebullitions of discordant parties. He readily resigned the royal stipend, without any observations of his own; yet it was thought at the time that it was with a reluctance that his taciturnity could not conceal. By this silent address he retained the confidence of the court party without losing favor among the republicans. He was afterwards equally respected by every class through all the changes of party and opinion which he lived to see."

The attitude of Judge Cushing up to the outbreak of the revolution was one of entire abstinence from participation in political discussion. He maintained an impenetrable reserve on all controversial subjects. Thus it happened that up to the very moment when the march of events compelled everyone to declare his position, it was not known whether his sentiments were in favor of the revolution or the royalists. When the time came for decisive action, he alone of all the justices of the superior court took sides with his countrymen in support of independence and separation. When the Council of State reorganized the courts in 1775, he only of those who previously had been on the court was retained in judicial position.

It seems plain that any aspersion upon the patriotism of Cushing and on his intense devotion to the land of his nativity is ungrounded. The position of administering justice in a province in rebellion was no holiday affair. It was a post of extreme peril. John Adams accepted judicial appointment because of its danger, as he wrote in his diary. Cushing risked even more because he had been a judge by royal appointment, and refused to follow his associates in their adherence to the cause of the crown. Courage and deep conviction must have dictated his course. His abstinence from controversial discussion was due to his acute sense of the propriety of his office, which is more widely appreciated now than in his own day.

John Adams was appointed the first chief justice of the Superior Court of Judicature after the separation from Great Britain. In reply to a letter of congratulation from Cushing, he wrote

"You do me great honor, Sir, in expressing a pleasure at my appointment to the bench: but be assured that no circumstance relating to that appointment has given me so much concern as my being placed at the head of it, in preference to another, who in my opinion was so much better qualified for it and entitled to it. I did all in my power to have it otherwise."

The obvious reference is to Cushing himself. Cushing wrote in a letter to John Adams jocosely indicating the burden resting upon those who undertake to administer justice in a province seeking by rebellion to establish its independence.

"I can tell the grand jury the nullity of acts of parliament, but must leave you to prove it by the more powerful arguments of the *jus gladii divinum,* a power not peculiar to kings or ministers."

Adams never performed the duties of chief justice, and when he resigned in 1777, Cushing, who as senior associate justice, had presided over the court since the Declaration of Independence, was appointed chief justice. He held this office twelve years. It was before the days of reporters. There were no written opinions. The record of his judicial acts is exceedingly scanty. It is to be gathered chiefly from newspapers, diaries, letters, and historical papers.

A duty apparently then regarded as much more important than now was that of charging the grand jury. The convening of the court commonly was marked by a comprehensive statement of the powers and obligations of the grand jury, coupled with an exhaustive and carefully prepared discussion of one or more branches of the criminal law, of special pertinency to the contemporaneous social conditions, and matters particularly challenging public attention or judicial interest. Such charges were not infrequently printed at the request of the grand jury, although I have been unable to find one of Chief Justice Cushing printed in full.

In the Massachusetts Gazette of Feb. 17, 1784, is found this paragraph:

"This being the third Tuesday of the month, the day appointed by law for the sitting of the Supreme Judicial Court of the Commonwealth for the county of Suffolk, the Honorable the Judges, arrayed in their scarlet robes, the Attorney General and other Barristers at Law, in their proper habits, walked in procession from State Street, preceded by their Prothonotary, and the High Sheriff with his officers and servants, to the County Court House. There was a large concourse of respectable citizens collected on the occasion, who showed much pleasure in this additional proof of confirmed peace, liberty, and law. The Court being opened in form, the Grand Jury were impanneled, to whom Chief Justice Cushing gave a learned and animated Charge."

In the Massachusetts Spy of April 23, 1789, printed at Worcester, occurs this statement:

"On Tuesday last the Supreme Judicial Court was opened in this town. His Honour, Chief Justice Cushing, gave a most excellent charge to the Jury. Among other things which his Honour was pleased to notice, was the evil tendency of libels—he pointed out in a very clear and concise manner, the distinction between the liberty and licentious-

ness of the Press,—the difference between a citizen publishing his sentiments, on public measures with a spirit becoming a freeman, and his stabbing and wounding private and public characters, and robbing them of their good name."

One of the most important and interesting cases of which record is found during the incumbency of Chief Justice Cushing relates to the subject of slavery. Prior to the adoption of the Massachusetts constitution slavery existed to a limited extent within the province of Massachusetts Bay. It is established that slavery was tolerated in that province notwithstanding contrary views[2] or even some decisions of trial courts.[3] The first constitution proposed to the people of Massachusetts after the Declaration of Independence, and by them rejected in 1778, gave the right of suffrage to "every male person being twenty-one years of age" and possessed of a certain amount of property "being free" and "excepting negroes, Indians, and Mulattoes." The constitution adopted in 1780 omitted the phrases, "being free" and "excepting negroes, Indians, and Mulattoes," in its description of those entitled to the suffrage. It was in this historical setting that a controversy arose in Barre, in Worcester county, respecting the status of a person named Quack, or as he is also called Quork or Quork Walker. One Nathaniel Jennison claimed him as a slave on the ground that in 1754 he was included with his father and mother in a bill of sale from one Zedekiah Stone, which purported to transfer title to "A certain negro man named Mingo, about twenty years of age, and also one negro wench named Dinah, about nineteen years of age, with her child Quaco about nine months old: all sound and well." After two civil actions respecting the matter had been brought, an indictment was found in September, 1871, against the man claiming to be owner for assault committed in undertaking to gain possession of the negro. This indictment came on to be tried in Worcester at the April sitting in 1783 of the Supreme Judicial Court. As was the custom at the time, the full court presided over the trial. It was composed of Chief Justice Cushing, and Nathaniel Peaslee Sargent, David Sewall, and Increase Sumner, Associate Justices. The charge of the Chief Justice to the jury has been preserved. It is so significant of a liberty loving spirit, that it is well worth recalling:

"As to the doctrine of slavery and the right of Christians to hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle, that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage—a usage which took its origin

[2] See for example Emory Washburn in (1855-58) 3 *Proceedings Mass. Hist. Society,* 188-203.

[3] *Winchendon v. Hatfield* (1808) 4 Mass. 123; *Commonwealth v. Aves* (1836) 18 Pick. 193, 209, 210.

from some European nations and the regulations of the British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural right of mankind, and to that natural, innate desire of Liberty, with which Heaven, (without regard to color, complexion or shape of noses, features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring all men are born free and equal—and that every subject is entitled to liberty,—and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by criminal conduct or given up by personal consent or contract."

As is pointed out by Chief Justice Gray in his exhaustive and learned note on the subject,[4] in another aspect of the same controversy three associate justices in the absence of the chief justice had declared that slavery was abolished in the Commonwealth of Massachusetts by the declaration of rights contained in the constitution adopted in 1780, but not being universally assented to throughout the state, the indictment against Jennison was brought to trial in 1783 before the whole court, and the same doctrine being then distinctively affirmed by the Chief Justice, and the jury being instructed accordingly, was thereby conclusively established as the law of the Commonwealth.

It is interesting to observe in this connection that almost the same phrase, which in Massachusetts was held to abolish slavery, is found in the first constitution of Virginia. Apparently no such question ever was presented to the Virginia courts.

Probably no case of the early state period attracted more widespread attention than that arising from the murder, in Brookfield, Massachusetts, in 1778, of Joshua Spooner. The chief interest in the event, both contemporaneously and subsequently, has attached to the connection with it of his wife Bathesheba Spooner, and the conditions under which she was executed. She was a daughter of the famous Brig. Gen. Timothy Ruggles of Hardwick, against whom there was violent prejudice because he adhered to the royalists and spent the remainder of his life in Nova Scotia. Whatever may be said as to proceedings subsequent to the sentence following the verdict of guilty and to the refusal of the executive branch of government to extend to this unfortunate woman suspension or commutation of sentence, the conduct of the trial, which occurred at Worcester in 1778, presided over by Chief Justice Cushing, was exemplary, and so far as I know

[4] (1873-75) 13 *Proceedings Mass. Hist. Society, 292-298.*

has never been criticised. The Rev. Dr. James Kendall, late of Plymouth, an intimate personal friend of the Chief Justice, has this to say concerning that trial:

"My earliest impressions of Judge Cushing were received by hearing my father describe his bearing and manner, as presiding at the trial of the murderers of Dr. Spooner of Petersham, in the county of Worcester, more than seventy years ago. My father lived in Sterling, twelve miles from Worcester, and was present at the trial of these criminals, four in number, including the wife of Dr. Spooner. I have a distinct recollection of the mild yet dignified manner, as described by my father, in which he presided at the trial, the impressiveness of his charge to the jury, and the solemnity and thrilling effect of the sentence pronounced by the Judge after conviction, not only upon the criminals, but also upon the Bar, and the whole audience assembled on this interesting and exciting occasion."

In the interest of accuracy it should be said that Mr. Spooner lived in Brookfield, and was a retired trader.[5]

For several decades at least the Superior Court of Judicature had exercised the power of calling the most promising and distinguished members of the bar to the degree of barrister. A statute was enacted in 1782 authorizing the court to confer this degree at discretion, and the following year a form of writ to be used for calling such persons before the court was prescribed. The last occasion upon which this degree was conferred was in 1784. It is said in the Massachusetts Gazette of February 17, 1784, that after "an excellent prayer adapted to the occasion" offered by Rev. M. Howard,

"the following gentlemen, practising Attorneys, were by special writ called to the bar, to take upon them the character, degree and dignity of a Barrister-at-Law, viz. Caleb Strong, Esq., of Northampton, Theodore Sedgwick, Esq., of Suffield, John Sprague, Esq., of Lancaster, William Rudor, Benjamin Hitchborn, and Perez Morton, Esqrs., of Boston, William Wetmore, Esq., of Salem, and Levi Lincoln, Esq., of Worcester. Theophilus Parsons, Esq., of Newburyport, being by sickness hindered from attending, had day given him to appear at a future term, to take the degree of Barrister."

In this list of nine names are found one who became chief justice, and two who became associate justices of the Supreme Judicial Court, two future governors of the Commonwealth, and one senator of the United States, and a high sheriff and chief justice of the court of common pleas of Worcester county. The accuracy and discrimination of the court in selecting for this most distinguished honor at the bar those destined to achieve eminence is beyond the peradventure of doubt.

The Chief Justice then made the following charge:

"The Court have thought fit to call each of you, gentlemen, to the bar, by special writ, to take upon you the character, dignity and degree of

[5] For a full account of this trial see (1844) 2 Chandler, *Criminal Trials*, 1-58.

a Barrister-at-Law. The qualifications necessary for which are a competent degree of knowledge and learning in general; particular experience and skill in the honorable profession to which you have devoted yourselves; close industry and application to study, by which knowledge is acquired and increased; joined with firm probity, that inflexible integrity of mind, producing rectitude of conduct and fairness of practice, with which those talents are directed to the utmost useful purposes, and without which the greatest abilities may be but the occasion of the greatest mischief to mankind; these qualifications united must form the useful member of Society, and be subservient to the great and good purposes of promoting private and public justice, of preserving the freedom and advancing the general welfare and happiness of the people. 'Tis a persuasion of your being possessed of these qualifications that has induced the Court to call you to this honor. There is a wide field open for the exertion and display of the greatest human powers and abilities. The union of the States is in its infancy, and ought to be cemented on the principles of equality and justice. Our constitution is new, and wants the vigor and support of its framers and constituents. Our system of laws is imperfect, and needs the skillful finishing hand of the lawyer. There ever will be parties, more or less, in the best constituted government, and some to foment them: while the wisdom of the statesman and the patriotic moderates, conciliates, and restrains, or directs all to the public good. There are weighty affairs to be transacted for settling public credit upon a sure and permanent foundation, a point most essential to our security and happiness. As from your character and situation in life you may be called upon to take part in carrying into effect these great public designs, of which you readily comprehend and feel the importance, permit me to remind you that the love of our country will ever, under all circumstances and upon all occasions, guide and direct to the noblest conduct. And learning and skill in the laws under the government of right principles, eminently qualify for every department in the State, as well as to promote truth and justice in the cause of your clients.

"I therefore now in the name of the Court formally charge you so to conduct yourselves, and so improve the talents and abilities, both natural and acquired, with which you are blessed, as to be of singular service to your country by ever defending its constitutional freedom, by strengthening as opportunity calls you, that union of the States which has been the groundwork of the present revolution, and must continue to be the basis of our liberty, so long as liberty shall endure; and in your general conduct and behaviour, as well as in your particular profession, so to demean yourselves as to continue and increase the reputation you have already acquired, and thereby do signal honor to the Court and the Bar."[6]

This brief yet comprehensive statement of the essential characteristics and primal duties of every member of the bar is a close approach to perfection. It is as virile and appropriate today as it was when delivered more than a century and a third ago. Its classic phrase, its incisive wisdom, its ringing Americanism make it apposite today as the guide for conduct of every member of the American bar.

[6] See Hon. Arthur M. Alger, *Barristers-at-Law in Massachusetts* (1877) 31 New England Historic-Genealogical Register, 206.

Chief Justice Cushing was a member of the convention which framed the Massachusetts Constitution of 1780. He was vice-president of the convention which ratified the Constitution of the United States in 1788, and presided at most of the sessions because of the illness of John Hancock who was president. It is said that in 1785 he declined a nomination for governor tendered him by both parties, preferring judicial to political life.[7] In 1780 Chief Justice Cushing and the associate justices Sargent, Sewell, and Sullivan together with Robert Treat Paine, the Attorney General, James Bowdoin, and John Pickering were appointed a commission "to select, abridge, alter and digest" the laws of the Commonwealth that they might be accommodated to the new government.[8] He was a founder and member of the American Academy of Arts and Sciences. It is said also that he was Attorney General of Massachusetts for a time, but of this I am unable to find any record. He was one of the electors of Massachusetts for the first president and vice-president of the United States, and cast his vote for Washington and Adams. He received the honorary degree of Master of Arts from Yale in 1753 and that of Doctor of Laws from Harvard in 1785.

The social unrest which prevailed, especially in this Commonwealth, after the close of the Revolution and before the establishment of the federal government, rendered the administration of justice peculiarly perilous and difficult. In a manuscript sketch of Chief Justice Cushing prepared by Charles Cushing Paine,[9] it is said:

"The Courts and Judges were subjected during these times to great annoyances, and occasionally to much personal danger; frequently, the court-houses were surrounded and filled by people armed and highly excited, and the Judges were refused admittance at the inns, or food either for themselves or their horses. One occasion, in particular, has been often mentioned, when the Judges were exposed to imminent hazard of their lives. On arriving at the inn of a town where the court was to be held, they found the whole intervening space to the court-house filled by a mob of many hundred, armed, and resolved to prevent the opening of the court. The Chief Justice was applied to by a committee from the mob, and entreated to yield to their wishes; he replied, that the law appointed the court to be held at that time, and it was their duty to hold it accordingly; and, followed by his Associates, he proceeded into the street. His countenance was blanched to paleness, but his step was firm. As he advanced, the crowd opened before him, but slowly and sullenly; muskets rattled, and some bayonets rapped upon his breast; quietly and firmly, however, he moved on, reached the court-house, and the court was regularly opened. The respect and affection universally borne towards him contributed, without doubt, in no slight degree, to preserve the public support to the courts, and maintained their authority in this crisis."

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[7] 12 National Cyclopedia of Biography, 548.

[8] 1 James Sullivan, 125.

[9] Quoted in (1875) 2 Flanders, *Lives and Times of the Chief Justices*, 34, 35.

When the government of the United States was inaugurated under the Constitution, it became the duty of Washington to appoint the members of the Supreme Court. The nominations were made in the hope, as he said, that they would "give dignity and lustre to our national life." To be named by him as the first associate justice of that august tribunal was a signal distinction, even among high honors. Chief Justice Cushing was called to this position, his commission being dated on September 27, 1789, next after that of the chief justice.[10] The work of the full court was light at first. It was not until the August term of 1792 that a case arose in which opinions were delivered. *State of Georgia v. Brailsford.*[11] In that case Mr. Justice Cushing wrote a dissenting opinion. It arose on a preliminary question, and when later it came before the court on its merits the view of Cushing prevailed. He was on that court twenty-one years. Its opinions during that period are found in ten small volumes. Mr. Justice Cushing appears to have delivered opinions in nineteen causes:

State of Georgia v. Brailsford, 2 Dall. 402, 408.
Chisholm v. Georgia, 2 Dall. 419, 466.
Bingham v. Cabot, 3 Dall. 19, 33.
Penhallow v. Doane, 3 Dall. 54, 116.
Talbot v. Janson, 3 Dall. 133, 168.
M'Donough v. Dannery, 3 Dall. 188, 193.
Ware v. Hylton, 3 Dall. 199, 281.
Fenemore v. United States, 3 Dall. 357, 364.
Calder v. Bull, 3 Dall. 386, 400.
Fowler v. Lindsey, 3 Dall. 411, 414.
Cooper v. Telfair, 4 Dall. 14, 20.
Ogden v. Blackledge, 2 Cranch, 272, 279.
Lambert v. Paine, 3 Cranch, 97, 138.
Marine Ins. Co. v. Wilson, 3 Cranch, 187, 192.
Marine Ins. Co. v. Tucker, 3 Cranch, 357, 397.
United States v. Heth, 3 Cranch, 399, 413.
M'Ilvaine v. Cox, 4 Cranch, 209, 211.
Hodgson v. Marine Ins. Co., 5 Cranch, 100, 109.
Marine Ins. Co. v. Young, 5 Cranch, 187, 190.

Several of these are exceedingly short. The total is less than the number now written annually by each member of that court. The chief labors of the justices were in the trial of federal causes in the several states. The U. S. Judiciary Act then required the holding of circuit courts in the several districts twice each year by two justices of the Supreme Court.

The most important case in which Cushing rendered an opinion was *Chisholm v. Georgia.*[12] The point to be decided was whether by virtue of the Constitution of the United States one of the states was subject to suit at the instance of a citizen of another state, it being plain that but for the provisions of that instrument, no such action could be

[10] (1790) 2 Dall. 399. [11] (1792) 2 Dall. 402. [12] (1792) 2 Dall. 419.

brought. The court was divided but an opinion expressive of the prevailing view that the Constitution created such right of suit, was delivered by Mr. Justice Cushing. It is a model judicial utterance, compact, cogent, brief. There is no superfluous word; there is no exuberance of thought. The reasoning is lucid, the language simple, the logic convincing. Native ability and power of mind were required. There were no precedents and no authorities upon which to rely. The directness and clearness with which he discusses the matter show the effect of contact in his early years with the frontier life of Maine. That had been the same kind of training which Lincoln received, and it bore the same kind of fruit in unclouded thought expressed in unmistakable words. It seems hardly worth while to take the time to review his other opinions in detail. Several are important. They all possess the characteristics so striking in *Chisholm v. Georgia*. Several notes in the reports show that by reason of sickness he was not able to join in the work of the court. The opinion of Cushing in *Cooper v. Telfair*[13] is interesting because it proceeds upon the premise that the court has power to declare acts of legislation in conflict with the Constitution. This was several years before the famous opinion by Chief Justice Marshall in *Marbury v. Madison*,[14] in which Cushing concurred. After Marshall became Chief Justice the opinions of the court for a number of years were mostly delivered by him.

During the absence of Chief Justice Jay on his mission to negotiate the treaty with Great Britain, Cushing presided as senior associate over the Supreme Court. He was the first member of that court to administer the oath of office to a President of the United States. He performed that function at the second inauguration of Washington in March 1793.

The death of Governor Hancock in 1793 made necessary the choice of a new chief executive of the Commonwealth of Massachusetts. Mr. Justice Cushing was nominated in 1794 by a "number of persons (of Boston) and various parts of the commonwealth met for the purpose, to the choice of their fellow-citizens (as) a man who might be most deserving of their suffrages." Their unanimous opinion was in favor of his election. A Boston caucus also nominated him later in the same month. Contemporary correspondence shows that leading Federalists had formed the intention of running him for governor sometime before. Cushing himself does not appear to have given any countenance to the plan. He wrote to Mr. Justice Increase Sumner, who had been one of his associates on the Massachusetts Supreme Judicial Court, *"Entre nous,* some gentlemen have proposed to me to stand for the first magistracy of our State: but many weighty reasons prompted me to decline." He says further, referring to Samuel Adams: "There is our good lieutenant governor, who stands in the

[13] (1800) 4 Dall. 14.

[14] (1803) 1 Cranch, 137.

direct line of promotion, and who has waded through a sea of political troubles and grown old and labored for the good of his country." However, a campaign was waged in behalf of these two men, but without much appearance of political warmth according to modern standards. There are occasional comments in the press respecting the contest. The "bugbear of State suability" seems to have been the main argument employed against Cushing. It was said that he had delivered an opinion in favor of the suability of Massachusetts. This refers to the decision of the United States Supreme Court in *Chisholm v. Georgia,* to the effect that under the federal Constitution a state was liable to suit at the instance of a citizen of another state. This decision created considerable excitement in Massachusetts the year before. A special session of the legislature was called by Gov. Hancock, and a resolution adopted in substance in favor of an amendment of the Constitution to avoid the results which might flow from the decision. John Adams said "I shall be happier if Cushing succeeds, and the State will be more prudently conducted." The election showed 14,465 votes for Adams, and 7,159 for Cushing with numerous scattering votes.[15]

This cannot be regarded as a voluntary participation by Cushing in a political campaign. In those days it was no uncommon thing for the nomination to high elective office to seek a man without his knowledge or be thrust upon him against his protest. Means for escaping were not readily available to one thus unwillingly put in the position of a candidate. It is wholly out of harmony with the character of Judge Cushing to infer that he consented to this electioneering in his behalf. Throughout a career of more than thirty-eight years upon the highest courts of state and nation, he observed with the utmost scrupulousness every judicial propriety which the most exacting sensitiveness could require. He abstained utterly from participation in discussion of a controversial nature. He refrained entirely from expression of political views. He suffered himself to do nothing which could afford, even to the most suspicious, ground for doubting his impartiality in approaching the decision of any case coming before him in his capacity as judge. His conduct was free from everything which could give color to the notion of favoritism or prejudice. He was most punctilious in maintaining the strictest canons respecting the conduct of his high offices. While the taste of that day did not require such complete separation of the judge from politics as now is rightly demanded, this incident in the career of Judge Cushing, when measured by its surroundings, does not detract from his lofty standard for the observance of official proprieties, even according to the highest criterion of the present.

[15] Independent Chronical, Mar. 1 & 6, 1794; Columbian Sentinel, Mar. 1 & 28, 1794; Morse, *The Federalist Party in Massachusetts* (1900) 141-145.

Cushing was nominated Chief Justice of the Supreme Court of the United States, and unanimously confirmed by the Senate on Jan. 27, 1796. On the evening of the same day he attended a large dinner party of the President. As he entered the room, Washington turned to him and said with great impressiveness, "The Chief Justice of the United States will please take his seat on my right." This was the first intimation conveyed to him of his selection. This expression of confidence is the more remarkable, since it followed immediately the rejection by the Senate of the nomination of John Rutledge as chief justice. It demonstrates complete reliance on the ability, learning, integrity, poise, and impartiality of Cushing. The letter transmitting his commission as chief justice was sent to him under the same date as his confirmation by the Senate. It is in these words:

"Department of State, January 27, 1796

Sir:

The President of the United States desiring to avail the Public of your services as Chief Justice of the Supreme Court of the United States, I have now the honor of inclosing the Commission and of expressing to you the sentiments of perfect respect with which

I am, Sir,

Your most obedient servant,

Timothy Pickering."[16]

He kept the commission about a week, when he returned it, notwithstanding the urgent remonstrance of Washington, asking on the ground of ill health to be excused from accepting. This is the only instance of actual declination of a nomination to this exalted office. The lofty conceptions entertained by Washington of the qualifications requisite for an appointee to the Supreme bench, the painstaking care always exercised by him in making nomination to public office, and his unequalled judgment of men render selection as chief justice by him a pre-eminence of the highest order. It is conclusive proof that Cushing was in truth the first judicial mind in the country. His confirmation by the unanimous vote of a senate in which partisan feeling was strong and bitter, shows that this fact was generally recognized.

The work of the justices of the United States Supreme Court at that time consisted in large measure in the trial of causes upon the circuit. The circuits were not assigned permanently, but were held in rotation, two justices sitting together. Hence each justice traveled over the entire Union to hold court. These journeys consumed a great amount of time, and were hardships of no mean order as compared with present easy methods of travel. The charge to the grand jury was an important judicial function. That of Cushing for the district of Virginia

[16] This copy was kindly furnished me by William Cushing Donnell of Hamilton, Maine, the owner of the original.

on Sept. 23, 1798, is said to have been an eloquent portrayal of horrors of the French revolution, and an exposition and defense of the Alien and Sedition laws.

Letters of Cushing to Chief Justice Jay disclose some of the hardships of members of the court of that day. The Chief Justice and Cushing were assigned together. In 1792 writing from Newcastle to Jay, who had been prevented from going by inflammation of the eyes, Cushing refers to traveling from York, Pa., to Philadelphia, and south to Maryland and Virginia, over rutted and muddy roads and across an eight or nine mile ferry to Annapolis. Another letter written just after Jay's return from negotiating the treaty and his election as governor of New York congratulates him in these doubtful words:

"I cannot so heartily relish the gubernatorial office which is presented to you, and with so much advantage in the choice. It will doubtless be for the good of New York, as well of the public in general: and what is of some consequence, more for your ease and comfort than rambling in the Carolina woods in June."

Judge Cushing died at Scituate on the 13th of September, 1810, in the seventy-ninth year of his age. The contemporary obituary notices indicate not only respect for the high offices which he held, but a genuine regard and deep esteem for the man. In the New England Palladium of Sept. 18, 1810, reference is made to the learning and integrity with which he presided as Chief Justice until 1789 over the State Supreme Court, so that in that unsettled period the court "attained a character for impartiality and knowledge that foreigners as well as our own citizens resorted to it, with the most perfect confidence, for a redress of their wrongs." The establishment of the supremacy of the laws in the period of the social discontent culminating in Shay's rebellion is attributed in large degree to the energetic conduct of the Chief Justice supported by his brethren. The same newspaper contains this further estimate:

"As a Judge the deceased united the learning of the scholar with the science of the lawyer. He sought truth, on whatsoever side she was to be found—alike regardless of the frowns of the great, or the clamors of the many—between whom, the relative difference, as members of the state, in his enlarged view, was extremely small. He was characterized for possessing uncommon patience of hearing, quickness of perception, and deep investigation. Towards the bar, his conduct was courteous without familiarity, and dignified without austerity. In executing the more solemn duties of his office—in pronouncing the last judgment of the law—his manner was peculiarly interesting and impressive.

"As an orator, his gestures were easy; and his eloquence was the more pleasing, as it was derived solely from nature. He was equable in his style which united simplicity with strength; chaste in his figures, correct in his thoughts, and perspicuous and smooth in his delivery. And, on all occasions, he anxiously avoided that pompous and inflated

manner of discourse, and those false and studied ornaments of speech, with which some endeavor to dazzle an auditory.

"Besides these qualities, which rendered him the delight and ornament of the bench and bar, he was possessed of those which made him beloved in private life. He was accessible, obliging, generous, and disinterested; and, when business did not engage his attention, sportive and gay with his friends. But, above all, being convinced of the truth of our holy religion, he was attentive to the performance of its duties; and united in his person the true Christian with the perfect gentleman."

The historian of Scituate who saw him upon the bench in 1801 "when his zenith brightness had probably abated" writes that "He still remembers how forcibly his youthful mind was affected by the order and perspicuity with which he performed the duties of his high office, and the mild though commanding dignity with which he guided the bar. In private life he was all that was amiable, always ready to instruct by useful discourse, and to make his friends happy by his cheerfulness." He says also that "In person he was of middling stature, erect and graceful: of form rather slight, of complexion fair, of blue and brilliant eyes, and aquiline nose."

His portrait was painted at Philadelphia by Sharpless. His letter to a niece, Miss Esther Parsons, under date of Jan. 29, 1799, refers to the matter in this way:

"I must give you a hint that Mr. Sharpless from New York has been here some weeks taking portraits, lodges in the same house with us: and that last week, he took your aunt: and whether you will believe it or not; he has given her a prodigious handsome face, and yet through the embelishments, one may see some of the original lineaments. Also not liking my portrait taken by him, which I believe you have seen at your Uncle George's, he has taken over again yesterday, which I like much better, though he does not incline to abate much, if anything in the nose."

The historian of Scituate also says of him:

"His oratory was ready and flowing, but not of that overawing description, with which some native orators of more fiery mold have transported audiences: but its excellence consisted in cool, deliberate judgment, and logical and lucid argumentation, which gave him eventually an advantage over those of more ardent temperament. As a judge he was eminently qualified by his learning, and not less by his unshaken integrity and deliberate temper."

The Josiah Quincy of his acquaintance gave this estimate of his character:

"His legal attainments were of high rank. His judgment sound, his habits laborious and devoted to the duties of his occupation and station. His virtues were of the pilgrim cast: pure in morals and inflexible in principle. But he was ambitious neither of literary nor political dis-

tinction. . . . The friend of such men as John Adams, Francis Dana, and Oliver Ellsworth, all of whom entertained for him the highest respect, could not be otherwise than of an elevated cast of intellect and moral power."

It is interesting to observe that most of those who have written from personal knowledge of his traits refer to his qualities as an orator. His accomplishments in this particular must rest upon what he said from the bench. There is no record of his having been connected with important jury trials at the bar, and no trace of his having thrilled juries by his eloquence. I have been unable to discover any notice of addresses delivered by him upon occasions of patriotic, historic, or other general public interest.

It strikes the modern ear as unusual to refer to judicial speech, even as embodied in charges to grand and petit juries, as examples of eloquence. The ordinary mind often thinks of the tricks of the demagogue, illustrated in the speech of Marc Antony and its effect, as examples of eloquence. More discriminating persons commonly regard appeals to the emotions as an essential characteristic of oratory. There is something to be said, however, in support of the accuracy of such use of the word as applied to William Cushing. Justice is the great interest of man on earth. The ultimate aim of all proceedings in court is the doing of justice according to law. In the part performed by judges toward the accomplishment of that grand end, reason controls the emotions. Elevated judgment and powerful thought expressed in clear language, by the moving utterance of the judge is designed to lead the minds of others to the banishment of passion, the elimination of prejudice, the discovery of error, the discernment of the truth, and the attainment of the right conclusion. The spoken word which influences the intellect, the conscience, and the conduct of others to that result is eloquence of no mean order. Oratory in its best sense hardly can reach to a higher plane of achievement. Tried by this test, the charges of Chief Justice Cushing upon the subject of slavery and to the persons called to be barristers already referred to may not inappropriately be termed eloquent.

William Cushing was possessed of learning, impartiality, integrity, courage, wisdom, vision, the capacity for clear thinking and forceful, clear expression. These are the attributes which by common convention characterize the great judge. But he was more than the sum of all these qualities. He was a judge of the court of last resort, which was at the same time the main trial court, of Massachusetts as a province of Great Britain, of Massachusetts as an independent state, and of the United States in its beginnings as a nation. He presided over the state court through the times of Revolution, and during what has been rightly termed the critical period of American History. He administered justice in the name of the king so long as that was com-

patible with devotion to the liberties of Englishmen. He, then, notwithstanding previous affiliations, alone among the high officers of the Province, had the courage to renounce fealty to the king, to embrace the cause of his native land, and to administer justice in the name of the People of Massachusetts. Amid the tempestuous times of the war for independence he presided over the judicial department of government in such manner as to win general confidence in the justice administered by the courts. In a period of domestic revolt he continued to administer the law of the Commonwealth so as to command respect. He interpreted and developed the common law under these circumstances of unprecedented delicacy and difficulty. Upon the inauguration of the federal government, he became a part of its judicial department, and participated through two decades in the establishment upon a sure basis of the greatest court known to the history of earth. He was thus a judge of the first rank under three different sovereigns, the province, the commonwealth, the nation. He assisted at the birth of two of these as independent states. It is remarkable, and I believe without parallel that one man could have earned, gained and retained the respect and confidence of the people as well as the admiration and trust of the leading men of the community under such diverse conditions.

It is difficult enough to achieve justice in the courts under settled conditions and in times of peace. It was Cushing's task to administer the law of the land, under successive and changing governments, amid the clash of revolutionary arms, and in a period of political unrest and uncertainty.

He was a pioneer in the field of constitutional law. That is a branch of jurisprudence peculiar to America and to the written constitution. He participated in framing the Constitution of Massachusetts. His attention was from the first directed to the exposition of constitutional principles and to the study of their effect upon common conceptions of property and personal liberty. There were no precedents. He was blazing an untrodden path. Native ability of rare power alone could cope with such a task. With a sure hand he laid deep and secure the foundations of constitutional law as a judicial function. The towering form of Marshall has dominated the domain of national constitutional law. But Cushing had beeen interpreting the great constitution of Massachusetts for nearly ten years before the Constitution of the United States was ratified. For a dozen years before the appointment of Marshall as Chief Justice, Cushing had been studying the federal charter of government from the viewpoint of the highest court in the land. In both positions he had met for actual decision questions of far reaching importance, and had solved them with wisdom and courage. Without abating one jot or tittle from the meed due to Marshall, it is well to remember the contributions of the first Chief Justice under the constitution of Massachusetts.